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Supreme Court of the United States

OCTOBER TERM 1966

No. 261

STEVEN L. RUSKIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM 1966

No. _____

STEVEN L. RUSKIN,

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE EARL C. WARREN, CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, STEVEN L. RUSKIN, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on March 18, 1966. (Appendix A, infra, p. A 1) An order, without opinion, denying petition for rehearing was entered on May 20, 1966, and also a judgment of the Court issued as and for an Order of stay of mandate for a period of thirty (30) days from May 20, 1966.

OPINIONS BELOW

There was no opinion in the District Court. The Per Curiam opinion of the Court of Appeals (Phillips, Senior Judge, and Jones and Brown, Circuit Judges) is reported in 358 F 2d 737 (5th Cir., 1966) and is printed for this Court's convenience at Appendix "A", infra, p. A 1.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit sought to be reviewed herein was made and entered the 18th day of March, 1966, and a copy thereof is appended to this petition at Appendix A, infra p. A 1. The Per Curiam opinion of the Court, dated March 18, 1966, affirmed the District Court's judgment of conviction (R 69). The petition for rehearing was timely filed and was denied without opinion on May 20, 1966. An Order of stay of mandate was granted for thirty (30) days from May 20, 1966.

This petition is filed within thirty (30) days from the date of Order denying petition for rehearing.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, U.S.C.

QUESTION PRESENTED

DID THE COURT OF APPEALS ERR IN AFFIRMING THE CONVICTION OF THE PETITIONER BY HOLDING THAT A TRIAL JUDGE IN A CRIMINAL CASE, SITTING WITHOUT A JURY, COULD INCONSIST-

ENTLY CONVICT PETITIONER, WHO WAS CHARGED WITH SEVERAL RELATED CRIMES, ON ONE COUNT AND ACQUIT HIM ON ALL OTHERS, ON EVIDENCE THAT LOGICALLY WOULD REQUIRE CONVICTION OR ACQUITTAL ON ALL COUNTS, CONTAINED IN A FIFTEEN-COUNT INDICTMENT?

CONFLICTING DECISIONS OF CIRCUIT COURTS OF APPEAL AND STATUTE INVOLVED

The denial of Petitioner's Appeal and the rehearing thereof by the United States Court of Appeals for the Fifth Circuit is in conflict with the decision of the United States Court of Appeals for the Second Circuit in the case of **United States v. Maybury** (2nd Cir. 1960) 274 F2d 899.

The Federal Statute involved is Section 371 of Title 18, U.S.C., which provides:

"Conspiracy

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years or both."

STATEMENT

The judgment of the Court of Appeals sought to be reviewed herein affirmed a judgment convicting the petitioner of one count of violating Title 18, Section 371, U.S.C.

The indictment (R 1) contained fifteen (15) counts; the first seven counts charged the petitioner and others with the fraudulent sale of securities, Title 15, Section 77 q(a), U.S.C.; counts eight through fourteen charged the petitioner and others with mail fraud, Title 18, Section 1341, U.S.C., and count fifteen, charged the petitioner with conspiracy to violate Title 15, Section 77 q(a), U.S.C. and Title 18, Section 1341, U.S.C. (as set out in counts one through fourteen) thereby violating Title 18, Section 371, U.S.C. The petitioner was tried by the trial judge, **without a jury**, and even though the trial judge found petitioner's co-Defendant guilty on various substantive counts with violating Title 15, Section 77 q(a), U.S.C., Title 18, Section 1341, U.S.C., and Title 18, Section 371, U.S.C., the same trial judge acquitted petitioner on the same evidence on counts one through fourteen, the substantive counts, but convicted petitioner on the conspiracy count. Petitioner was sentenced to three (3) years probation (R 69).

The gravamah of the reversible error was that the trial judge, sitting without a jury, on the same evidence which pertained to the substantive counts and to the conspiracy count, and upon which he convicted petitioner's co-defendant on both the substantive counts and the conspiracy count, acquitted petitioner of the substantive counts but, compromised the evidence in his own mind,

and convicted petitioner on the conspiracy count. In reality, all the evidence adduced at the trial was applicable to all counts of the indictment, and under the circumstances required the trial judge, **sitting without jury**, to either convict or acquit petitioner on all counts of the indictment.

The Court of Appeals affirmed the District Court, in a Per Curiam opinion (Appendix A, infra, p. A 1) and denied rehearing without rendering an opinion.

REASONS FOR ALLOWANCE OF THE WRIT AND ARGUMENT AMPLIFYING REASONS

The decision herein is in conflict with the decision of the Second Circuit in **United States v. Maybury** (2nd Cir. 1960) 274 F 2d, 899, where that court said that a trial judge, sitting in a criminal case, without benefit of jury, could not render an inconsistent verdict, convicting a defendant on one count of an indictment and acquitting him on another count of the indictment upon the same evidence adduced at the trial, where the necessary elements of both counts are irrevocably interwoven and related to each other.

In support of the foregoing, Petitioner would respectfully submit to this Court the following pertinent facts. Petitioner Ruskin was charged in a multi-count indictment (Counts I through VII, Fraudulent sale of securities, Title 15, Sect. 77q (a) U.S.C., Counts VIII through XIV, Mail Fraud, Title 18, Sect. 1341, U.S.C., and Count XV, Conspiracy, Title 18, Sect. 371, U.S.C.). Petitioner waived trial by jury and was tried by the Court without jury. Petitioner was tried with co-defendant Robert A.

McKee, whom the trial court found guilty as to Counts I through V, VII through IX, XI, XIV and XV of the same indictment.

At the trial, the transcript of testimony reflects that there was no separation of evidence or testimony, as to this Petitioner with respect to the individual counts contained in the indictment; that the same evidentiary matter was relied upon by the prosecution to try to prove Petitioner guilty of all fifteen counts of the indictment. In truth and fact, it was apparent that the prosecution, and the trial court itself, based the trial and conviction respectively of Petitioner on Count XV, (Conspiracy), Title 18, Sect. 371, U.S.C., and acquittal of Petitioner of the remaining fourteen counts of the indictment on the same evidentiary matter. Petitioner submits that the use of the same evidentiary material by the trial court leading to the acquittal of Petitioner of Counts I through XIV was inconsistent with the conviction of Petitioner, by the trial court, **without a jury**, of Count XV. Petitioner submits that this action falls squarely within the rule pronounced in **United States** v. **Maybury** (2nd Cir. 1960) 274 F 2d, 899 and that Petitioner's conviction must therefore be reversed.

Research reveals that the main line of argument, which the prosecution will contend is contra to the Petitioner's position, is derived from **Dunn** vs. **United States**, 1932, 284 US 390, 52 S. Ct. 189. This case decided in 1932, was argued by the prosecution in the **Maybury** case, supra. The court distinguished **Dunn** in arriving at its well reasoned holdings in **Maybury**. Petitioner submits that as **Dunn**, did not apply to **Maybury**, it likewise does not apply to the instant case. Further, the Sixth Circuit, in the

case of **Manley v. United States** (6th Cir. 1956) 238 F 2d 221 has rejected the theory set forth in **Dunn**. Petitioner submits that the rule set forth in **Maybury** is controlling in the case of this Petitioner, STEVEN L. RUSKIN.

The Court, in **Maybury**, has examined the background of jury verdicts in criminal cases despite an inconsistency as between counts of the indictment, and felt that the reasoning cited in **Dunn** was not applicable when a criminal case has been tried by a judge without jury. In its opinion the court said,

> "There is no need to permit inconsistency in the disposition of various counts so that the judge may reach unanimity with himself; on the contrary, he should be forbidden this easy method for resolving doubts."
>
> **United States vs. Maybury**, Supra, 903.

Maybury was indicted on one count of forgery and one count of uttering a forged instrument. The appellate court, found that the trial court, in convicting **Maybury** of uttering a forged instrument and acquitting him of forgery, was inconsistent in its decision. It found that the trial judge must have based his conviction of Maybury on one count and acquittal of one count upon the same evidence adduced at the trial. The 2nd Circuit felt that the decision of the trial judge was merely a compromise on the part of the trial court. The rule set forth in **United States vs. Maybury**, supra, was held in **United States v. Sells** (2nd Cir. 1963) 325 F 2d 161, to apply also to inconsistent verdicts as between defendants tried together.

Petitioner would submit that since the advent of the decision in **United States v. Maybury**, supra, the rule cited therein has been the topic of several law review articles.

The inconsistency theory, as espoused in **Maybury**, comes into play,

> ". . . where a defendant charged with several related crimes was acquitted on some counts and convicted on others on evidence that logically would require conviction or acquittal on all."
>
> 1961 **Duke Law Journal**, 121, 138

> "The Court in Dunn seemed to think that the joinder of counts for the convenience of trial should confer on the defendant no greater rights than those he would have if the counts were tried separately. Since Sealfon v. United States, 332 U.S., 575 (1948) effectively prevents a conviction that is inconsistent with a prior acquittal, continued adherence to Dunn deprives the defendant of a right he would have if the counts had been tried separately." . . .
>
> "The underlying principle of Dunn suggests that the specific conclusion there reached should no longer be followed, so that a defendant in a multiple count trial will have rights equal to those of a defendant successively tried. It is not unlikely, therefore, in view of the Sealfon decision, and because of the failure of the consideration of jury leniency to provide any effective support for Dunn, that the Supreme Court will refuse to

adhere to that decision when the question is again presented."

60 **Columbia Law Review**, 999, 1009

To sum up the current law review opinions,

"It is submitted that the result in the instant case (Maybury) is sound and should be followed in all cases where trial is by the court without a jury. No reason exists in principle or authority to allow a trial judge to render an inconsistent verdict."

6 **Howard Law Journal**, 1960, p. 228

Subsequent to **Maybury**, supra, there have been no cases decided on the federal level putting forth the inconsistency theory, so thoroughly examined in Maybury, in connection with a multi-count indictment, where the trial was to the court sitting without a jury. However, the court, in **Johnson v. State**, 209 A 2d 765 (Maryland 1965) cited the **Maybury** rule, stating that it was the law in criminal prosecutions before a judge without a jury.

Petitioner would respectfully show that the identical basic elements were necessary if Ruskin were to be convicted of violating Title 15, Sect. 77q (a) U.S.C., (Counts I through VII of Indictment), Title 18, Sect. 1341, U.S.C., (Counts VIII through XIV of Indictment) and Title 18, Sect. 371, U.S.C. (Count XV of Indictment), to-wit: the willful knowing and intentional acts to violate the aforesaid portions of the United States Code.

As to Title 15, Sect. 77q (a) U.S.C., there must be a

willful and knowing intent to violate this section by entering into or perpetrating a scheme or device to defraud in the sale of securities.

As to Title 18, Sect. 1341, U.S.C., there must be a willful and knowing intent to violate this section by devising a scheme or device to defraud and to accomplish this by the use of the mails.

As to Title 18, Sect. 371 U.S.C., there must be a willful and knowing intent to violate this section of the United States Code based, upon a willful knowledge and intent to commit an offense against the United States, in the instant case, to violate Title 15, Sect. 77q(a) U.S.C., and Title 18, Sect. 1341, U.S.C.

> "Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself."

Ingram v. United States, 79 S Ct. 1314, 1319.

The common element is that there be a willful and knowing intent to devise, enter into a common scheme or device for the fraudulent sale of securities through the use of the mails.

Yet at the trial of the case, no distinction was drawn in the evidence as to this Petitioner's alleged violation of the specific code sections, which were incorporated in Count XV, and certainly, it must be conceded that logically, the trial court based his acquittal of Petitioner on Counts I through XIV on the same evidence that he

based his conviction of Petitioner upon Count XV. The action of the trial court in the instant case can only be summed up by again referring to **United States v. Maybury**, supra, where the court said,

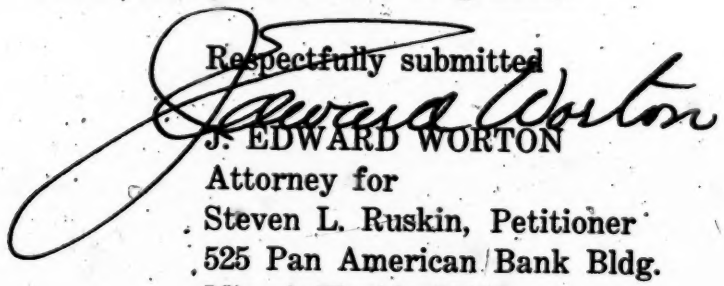
> " . .. we can have no confidence in a judgment convicting Maybury of one crime when the judge, by his acquittal of another, appears to have rejected the only evidence that would support the conviction here."
>
> **United States v. Maybury**, supra, 905.

It must be argued that the conviction of Petitioner of violating Count XV, Title 18, Sect. 371, U.S.C., was a compromise and thus falls squarely within the **Maybury** rule.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted



J. EDWARD WORTON
Attorney for
Steven L. Ruskin, Petitioner
525 Pan American Bank Bldg.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the required copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was on this 17th day of June, 1966, mailed to the Hon. William A. Meadows, United States Attorney for the Southern District of Florida, United States Courthouse, Miami, Florida; to the Solicitor General, Department of Justice, Washington 25, D. C.

J. EDWARD WORTON

J. Edward Worton

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22609

ROBERT A. McKEE and STEVEN L. RUSKIN,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(March 18, 1966.)

Before PHILLIPS, Senior Judge,* and JONES and BROWN, Circuit Judges.

PER CURIAM: The appellant McKee contends that the offense of which he was convicted was a part of the same scheme and conspiracy of which he was acquitted in another trial under another indictment in the Southern District of Florida. There is no merit in this contention of former jeopardy.

The appellant Ruskin urges that the evidence was insufficient to warrant a conviction and that his motion for judgment of acquittal should have been sustained. We have no difficulty in reaching agreement with the district court that the evidence was fully adequate to sustain a conviction.

The judgments of the district court are

AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22609

D. C. Docket No. 64-130 Cr.

ROBERT A. McKEE and STEVEN L. RUSKIN,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before PHILLIPS, Senior Judge,* and JONES and BROWN, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed.

March 18, 1966

*Of the Tenth Circuit, sitting by designation.

Issued as Mandate:

U. S. COURT OF APPEALS
FILED
MAY 20 1966
EDWARD W. WADSWORTH
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22609

ROBERT A. McKEE and STEVEN L. RUSKIN,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee

Appeals from the United States District Court
for the Southern District of Florida

ON PETITIONS FOR REHEARING

(May 20, 1966)

Before PHILLIPS*, JONES and BROWN, Circuit Judges

PER CURIAM:

IT IS ORDERED That the petition of each of the appellants for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

---

*of the Tenth Circuit, sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 261

STEVEN L. RUSKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 640-641; Pet. App. 1a-2a) is reported at 358 F.2d 737.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1966 (R. 642). A petition for rehearing was denied on May 20, 1966 (R. 643-654). The petition for a writ of certiorari was filed on June 20,

1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court, sitting without a jury, could properly find petitioner guilty on a conspiracy count and not guilty on substantive counts.

STATEMENT

Petitioner and others were charged in the United States District Court for the District of Florida in a 15-count indictment. The first seven counts charged fraudulent sales of securities in violation of 15 U.S.C. 77q(a); the next seven, mail fraud in violation of 18 U.S.C. 1341; and count 15 a conspiracy to violate the statutes cited in the substantive counts (R. 561-579). The general nature of the scheme was that the defendants would make fraudulent representations to investors in the sale of notes of the Commercial Capital Corporation ("Commercial") and the Industrial Finance Corporation ("Industrial") by stating that these corporations were operating at a profit and could pay interest as high as 15%; by lulling investors into a sense of security by making some interest payments; by stating that the notes were secured by other collateral paper in excess of the amount of the notes; and by stating that they had obtained insurance against the corporations' losses (R. 562-566). In a trial to the court (a jury having been waived), petitioner was found guilty only on Count 15, the conspiracy count; he was sentenced to

probation for three years and a $500 fine (R. 554, 557-558).[1] On appeal (R. 621) the conviction was affirmed (R. 642).

The evidence showed that in the spring of 1959 one Sills told petitioner, a Miami attorney, that he wished to activate a dormant financial corporation, so that he could advertise it as having been in existence for some time (R. 147-149). Petitioner knew that Sills had been convicted on a Florida charge of grand larceny (R. 146-147), and of giving a false financial statement to the Securities and Exchange Commission (R. 213). Sills, who had received publicity as a result of his grand larceny conviction, felt that his real name would have an adverse effect on prospective investors and changed it to R. S. Roberts. Petitioner prepared various legal papers for Sills, using the name Roberts (R. 150-151). On April 24, 1959, the A-Gee Construction Co., Inc., which petitioner had formed in 1953, changed its name to Commercial Capital Corporation, with petitioner signing the amendment certificate as president of A-Gee (R. 161-162). Sills, using the name Roberts, sent a letter to investors dated April 27, 1959 (Gov. Ex. 13) after having discussed its contents with petitioner. This letter read in part (R. 160):

> Commercial Capital Corp. has been incorporated since 1953, and enjoys a well-earned reputation in the financial world for capable and astute management.

---

[1] Codefendant McKee was found guilty on the conspiracy count and guilty on all of the substantive counts with the exception of Counts 6, 10, 12 and 13 (R. 554).

At the time petitioner knew that Sills had no money. As a result of this letter approximately $20,000 was received at petitioner's office (R. 162-164).

Sills was primarily a salesman and did not know how to acquire "car paper" at a discount (R. 165, 167). Petitioner and Sills decided that codefendant McKee, whom they had known at Federal Finance, would be a good finance man for the corporation (R. 165). McKee accepted Sills' offer of a 25% interest in Commercial plus a working wage as an officer (R. 166). Sills testified that investors were to be told that if they loaned $1,000, they would receive a promissory note from Commercial and their investment would be secured by a collateral assignment consisting of "car paper" in the amount of 25% over the face value of the notes (R. 166-167).

Petitioner and Sills discussed possible purchase from Gottlieb and Chariton of car paper, much of which was uncollectible and could be purchased at a low price (R. 169-172). Petitioner was aware that this paper was to be used as collateral for investors' loans (R. 172-173). Gottlieb testified that, after negotiations with petitioner, Gottlieb's company on August 18, 1960 (after it had lost its license) sold paper to Commercial with a face value of $107,000 for a price of $21,468 (R. 414-417, 431). Chariton testified that his General Loan Company sold bulk discount paper to Commercial with a face value of between $20,000 and $30,000 for $5,000 (R. 436-437). For this Chariton was paid by check in the amount of

$25,000 payable to General Loan Company (R. 440-441). Out of this $25,000 check, $5,000 was deposited in a General Loan Company account and a check for $20,000 was delivered to Sills (R. 442-443). Petitioner and McKee approved for Industrial and Commercial letters to the investing public and newspaper advertisements (R. 333, 336, 379, 390-391). For legal services petitioner received $13,062.39 from Commercial and $6,650 from Industrial (R. 505).

A typical investor lost most of his investment. For example, one Commercial investor received only $750 as a return of principal through the bankruptcy court and $2100 in interest, on a total investment of $15,000 (R. 47).. Financial statements showed a loss of $134,743.73 for Industrial as of September 30, 1960, and a loss of $233,600 for Commercial as of April 30, 1961 (R. 493, 494).

ARGUMENT

The evidence set forth in the Statement amply supports the conclusion of the trial judge that petitioner was part of the conspiracy to defraud. Petitioner argues that, nevertheless, the conviction should be reversed because the judge did not also find him guilty of the substantive counts based on mailings to particular defrauded investors with whom petitioner did not personally deal. It may well be that, under the doctrine of *Pinkerton* v. *United States*, 328 U.S. 640, petitioner could properly have been found guilty of the substantive offenses in furtherance of the conspiracy even though he did not directly participate

therein. The fact that the judge failed to apply that principle to petitioner gives him no ground to complain of a verdict which the evidence clearly supports. There is no *factual* inconsistency in the judge's verdict, such as was present in *United States* v. *Maybury*, 274 F.2d 899 (C.A. 2) upon which petitioner relies; there is at most an error of law in petitioner's favor in that the court did not apply the conspiracy principle to the full extent possible.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
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BEATRICE ROSENBERG,
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Attorneys.

JULY, 1966

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-vs-

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 261

STEVEN L. RUSKIN, Petitioner

-vs-

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR REHEARING

The Petitioner, STEVEN L. RUSKIN, herewith files his Petition for Rehearing from the Order of this Court filed October 10, 1966, which denied Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit with relation to the judgment of said Court entered March 18, 1966 (R 642) and reported at 358 F.2d 737. This Petition is filed in accordance with 28 U.S.C. Supreme Court Rule 58; more specifically, Petitioner submits that there are substantial grounds which were available to him which he has not previously presented, in addition to which case rulings

have been filed subsequent to the time Petitioner presented his original petition to this Court.

It is respectfully submitted that this Court, in connection with its refusal to grant Petitioner a Writ of Certiorari, has apparently overlooked, in addition to the points set forth in the original Petition for a Writ of Certiorari based upon UNITED STATES vs. MAYBURY (C.A. 2d 1960) 274 F2d 899, the law as set out in UNITED STATES vs. CIANCHETTI (C.A. 2d 1963) 315 F2d 584, in PHILLIP vs. UNITED STATES (C.A. 9th, 1966) 356 F2d 297, and by this Court in INGRAM vs. UNITED STATES (1959) 360 U.S. 679, 79 S.Ct. 1314.

Respondent in its Brief in Opposition to the Petition for a Writ of Certiorari, in its Statement of the Facts seeks to set forth evidentiary material upon which it believes the trial judge based his conviction of Petitioner of conspiracy as set forth in the indictment (R1). For the sake of argument even if the Petitioner knew of or participated in the acts set forth in Respondent's Statement (Res. Br. 2-5), the Petitioner would still not be guilty of conspiracy in violation of 18 U.S.C. 371. At the trial, the prosecution failed to show any fixed agreement on the part of the Petitioner to participate in the venture. The Court in UNITED STATES vs. CIANCHETTI, Supra, said:

> "But knowledge of the existence and goals of a conspiracy does not of itself make one a co-conspirator. There must be something more than mere knowledge, approval of or acquiescence in the object or the purpose of the conspiracy . . . CLEAVER vs. UNITED STATES 238 F2d 766, 771 (10th CIR. 1956). This "something more" is

> generally described as a "stake in the venture". In prosecutions for conspiracy . . . (the defendants) attitude towards the forbidden undertaking must be positive . . . he must in some sense promote their venture himself, make it his own, have a stake in its outcome". UNITED STATES vs. FALCONE 109 F2d 579, 581 (2d CIR.) AFF'D 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed 128 (1940)."

The evidence presented before the trial court failed in every instance to establish beyond every hypothesis of innocence that the Petitioner had a personal knowledge of the false or fraudulent manner in which his Co-Defendant, McKee, operated or managed the business of Industrial or Commercial. BECKERMAN vs. UNITED STATES 96 F2d 15. Further, from the evidence presented to the trial court, there was an affirmative lack of direct testimony that Petitioner had personal knowledge that the business, in which his co-defendant McKee was engaged in, was being operated in a deceitful manner. Constructive or circumstantial knowledge of this deceit is insufficient to prove criminal intent, a necessary element to the crime of conspiracy. See PHILLIPS vs. UNITED STATES (C.A. 9th 1966) 356 F2d 297, 303.

It is affirmatively submitted that Petitioner, an attorney representing a client, had no stake in the business of Industrial or Commercial, nor did he do anything to make the venture his own. If this Court allows the conviction against this Petitioner to stand affirmed, then, arguendo, any attorney representing a client, drawing legal documents or giving advice to a client, is in jeopardy of being convicted of conspiracy, if the client runs afoul

of the law based, wholly or partially, upon legal documents or advice given to the client by the attorney. This would include organizing a corporation for a client, examining an abstract of title, preparing deeds, mortgages, etc.

In addition to UNITED STATES vs. CIANCHETTI, Supra, it is submitted that this Court may have overlooked the fact that it has previously said,

> "Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself."
>
> INGRAM v. UNITED STATES,
> (1959) 360 U.S. 679; 79 S.Ct. 1314, 1319

In the instant case, the trial court, by acquitting Petitioner of the substantive charges, apparently failed to find any criminal intent on the part of the Petitioner, thus negating and contradicting itself by finding Petitioner guilty of conspiracy, yet at the same time the trial court found the co-conspirator, McKee, guilty of conspiracy and of the substantive counts. Innocent participation is not actionable and no criminal intent having been found to exist, the necessary quality of intent as to the conspiracy is non-existent. PEOPLE v. POWELL, 63 N.Y. 88.

It must therefore be submitted that the rule of law set forth in UNITED STATES vs. MAYBURY (C.A. 2d 1960) 274 F2d 899, should govern the instant case as all counts of the original indictment (R1) are based upon the

same facts and therefore acquittal on the substantive counts and conviction of Petitioner of conspiracy is wholly inconsistent, especially when co-defendant McKee was convicted on conspiracy and the substantive counts. The result is wholly irreconcilable with any rational theory, as on one hand it is adjudicated that there was no criminal intent and on the other hand that there was such an intent, and therefore the judgments of the trial court can only be explained on the basis of compromise.

If the law is settled, as it apparently is, that the overt acts of one co-conspirator are adopted by and are the acts of another co-conspirator, it is difficult to rationalize the acquittal of this Petitioner of the substantive counts of the indictment yet, on the very same facts and evidence, the conviction of the co-conspirator McKee on the same substantive counts, keeping in mind that the trial court found both Petitioner and the co-conspirator McKee guilty of the conspiracy count. This conflict falls squarely within the MAYBURY rule.

The government's brief admits that the trial court committed error, in that it could have found Petitioner guilty of the substantive counts. Petitioner submits that if error was present in the decision of the trial court, it should be resolved in his favor, as if he was found not guilty of the substantive counts, he should benefit from the evidence decided in his favor as to those counts of the indictment; that in applying the same evidence, which the trial court did, to the conspiracy count, Petitioner should have been acquitted of conspiracy. The evidence relating to the common element of both the substantive counts and the conspiracy count of the indictment, to wit, criminal intent, was based on the same facts. Of neces-

sity, then, the trial court in convicting the Petitioner of conspiracy, believed and relied on the very same evidence it chose not to believe when it acquitted Petitioner of the substantive counts, thus raising a true conflict as described in the MAYBURY case. The judgment of the trial court was wholly irreconcilable with any rational theory and the trial court's ruling can only be explained on the basis of compromise.

CONCLUSION

It is submitted that the point submitted to this Court in the instant case is of great importance; that it has great bearing upon the function of a trial judge sitting without a jury; that there appears to be no uniformity between circuits as to the limits of discretion to be exercised by a trial judge, sitting without a jury, in a criminal case. Uniformity in such an instance, between circuits should be achieved regardless of whether or not the decision of a lower court is clearly erroneous.

Petitioner respectfully submits therefore, that he be granted a rehearing upon his Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon the grounds heretofore set forth which affirmatively show that Petitioner, having been acquitted on all substantive counts of the indictment by a trial judge sitting without a jury, should necessarily have had all of the evidence which was decided in his favor by the acquittal, to wit: criminal intent, also decided in his favor thereby resulting in his acquittal of the conspiracy count. The contradictory ruling by the trial court and the appellate court in the instant case, affirming the guilt of the

Petitioner lies squarely within the rule of UNITED STATES vs. MAYBURY, Supra.

Respectfully submitted,

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CERTIFICATE

I HEREBY CERTIFY that this Petition was not presented for delay and was filed in good faith; that this Petition is restricted to matters which were available to Petitioner and not previously presented and also on decisions which were filed subsequent to the time Petitioner filed his original Petition.

J. EDWARD WORTON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the required copies of the foregoing Petition for Rehearing were mailed to the Clerk of the United States Supreme Court; to the Honorable William A. Meadows, United States Attorney for the Southern District of Florida, United States Courthouse, Miami, Florida; to the Solicitor General, Department of Justice, Washington, 25, D. C., this 22d day of Nov., 1966.

J. EDWARD WORTON